

August 10, 2017

Mr. Michael Bailey
Chief Deputy/Chief of Staff
Office of the Arizona Attorney General
1275 West Washington Street
Phoenix, AZ 85007

Dear Mr. Bailey,

I am in receipt of your July 20th letter regarding *State v. MCCCCD* and the Arizona Board of Regents' decision to not immediately eliminate in-state tuition to Arizona students with DACA status until appellate proceedings have concluded. You have shared that the Attorney General's Office is considering the appropriate action to take regarding ABOR's decision. I appreciate the opportunity to provide some perspective on the board's decision and why it is in the best interests of the state.

For the benefit of your office, and for the benefit of the members of the public whom our respective entities both represent, I have attached an appendix that sets forth the facts and timeline associated with the board's actions.

You begin your letter by noting your office's own general practice of waiting until the Arizona Supreme Court has spoken because "[t]his practice serves the interests of justice and ensures efficient adjudication of issues." As a longtime public administrator in Arizona with experience in the legislative and executive branches, I can speak firsthand to the benefits and acceptance of this practice to wait until the final disposition of a case to avoid confusion in policymaking and implementation. I know it is not lost on you that any abrupt deviation of that longtime and well-respected practice could create immediate difficulties for the state, given the number of cases before the state courts whose final disposition implicates not only state law and the state budget, but could create significant hardship for residents of this state.

All of these considerations are magnified when the issue we are addressing here is of such great importance – not only to DACA students, but also to the Board of Regents and to the people of Arizona.

The board is a constitutionally created body entrusted by the citizens of the State of Arizona with the governance of our universities, and by the legislature with the setting of tuition. Tuition

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setting is one of the most important duties of the board and one that the Regents take quite seriously. It is not simply a question of funding our universities. Our state's economic competitiveness depends upon the education of all qualified students. That is why access, affordability and student success are priorities of the board.

As you are aware, under state law, I am not at liberty to reveal the discussions that occurred during executive session. But I can tell you that the board's constitutional and statutory responsibilities and the concerns noted above weighed heavily in the Regents' ultimate decision. Those were important considerations along with those you cite, justice and efficiency, as well as questions of basic fairness to DACA students. And, as Chairman Ridenour noted when the Regents announced their decision, the questions at issue here are also of national importance.

All of this is more than reason enough to proceed in a measured and prudent way.

Your letter actually raises further considerations of justice and fairness, not to mention logic, that support the Regents' decision. If the Regents were to end in-state tuition for DACA students, we would have the anomalous situation of treating one set of DACA students differently from another set of DACA students. Specifically, because MCCCCD is seeking review of the Court of Appeals' decision, no one can argue that it is acting in contravention of Arizona law by continuing to extend in-state tuition to DACA students. The board was not a party to *State v. MCCCCD*. But your suggestion that ABOR should immediately change its policy because of that decision, if implemented, would mean DACA students who have chosen to attend an Arizona public university will be denied in-state tuition while their community college counterparts are not.

If the Supreme Court reverses the Court of Appeals' decision, it means that the universities have charged these students higher tuition levels unnecessarily or, more likely, the higher tuition has prevented these students from continuing their university education. The higher education community has understood that the MCCCCD litigation is the test case that will resolve the DACA tuition issue in this state. It makes sense to modify the board's interpretation of its tuition policy, if necessary, when the courts have resolved that case.

As has been noted in the press, ABOR does have a Non-Resident Tuition Rate for Arizona High School Graduates. This tuition status is available to all students, not just DACA students, who are not otherwise eligible for in-state tuition status and who meet the specified criteria. While the rate – 150 percent of in-state tuition – is the same as that made available to residents of other western states enrolled in the Western Undergraduate Exchange (WUE) program, the actual basis is the average actual cost to the universities. This may well make it possible for some DACA students to still obtain a college degree even if they are denied in-state tuition. Contrary to press reports, however, it is not a viable solution for all of the DACA students in the event they lose their in-state tuition status.

First, not all DACA students are eligible for the Arizona High School Graduate tuition rate. To be eligible, students must have graduated from an Arizona high school, and must have attended high school in Arizona for a minimum of three years while physically present in Arizona. There may be DACA students who currently have in-state tuition status who cannot meet these criteria.

Second, and more importantly, for many DACA students the 150 percent rate may prove to be as unaffordable as the full out-of-state tuition rate because DACA students do not receive state or federal financial aid. DACA students fund their educational costs with the monies they earn from the jobs that their DACA status legally allows them to hold. Another key component is private scholarships. Eliminating in-state tuition, however, may put those scholarships in jeopardy.

TheDream.US is the country's largest scholarship program for DACA students. It offers scholarships of up to a total of \$29,000 to DACA students to attend Partner Colleges – ASU is one of them – “in states that provide an affordable college education through in-state tuition.” This year, 71 ASU DACA students have been awarded TheDream.US scholarships, representing almost \$2.3 million in scholarship awards. For many of those students, the loss of their scholarships would make the availability of the 150 percent tuition rate meaningless.

In summary, the 150 percent tuition rate, while perhaps helpful for some DACA students, does not eliminate, and for many may not even minimize, the significant disruption that will occur if DACA students lose their in-state tuition status. Charging DACA students non-resident tuition, at the 150 percent rate or higher, does not mean Arizona will collect more money than if it charges them in-state tuition. The reality is that most DACA students will have to end or seriously curtail their college education because they will not be able to afford attendance at our universities.

I appreciate that your general practice of awaiting final word from the Arizona Supreme Court is “weighing heavily” in your analysis. In this case, “final word” from that court may come in the relatively near future if the Supreme Court decides not to review the Court of Appeals decision. If that happens, then this matter is conclusively settled and ABOR of course would act accordingly. But, if the Supreme Court grants review, then presumably it is interested in at least making some changes in the lower court's ruling, and that weighs more heavily in favor of waiting until we hear what the Supreme Court has to say. In short, consideration of the factors outlined above should further tip the scales in favor of awaiting final word from the Supreme Court.

Should you decide otherwise, we are confident that a court would agree that it makes no sense to proceed with a new lawsuit when the matter may be resolved procedurally in just a few months or on the merits in the not too distant future. In circumstances similar to those here, courts, while acknowledging that they are bound by decisions of higher courts, often will refrain from taking action when an appeal of the decision at issue is pending. This is particularly true in a case such as this where immediate termination of in-state tuition would have a devastating impact on

hundreds of innocent young people. Under these circumstances, filing a lawsuit against ABOR would be an imprudent use of state resources and thus contrary to the public policy underlying the state statutes you cite.

The broader national discussion of these issues also counsels proceeding in a just and prudent manner. Without the benefits of permanent legal residence, our students face enormous challenges even in spite of the benefits their education will provide. We recognize that only Congress can end their immigration purgatory. For several years now, we have made multiple appeals to Congress and to the President to provide legal certainty for our students, most recently in the board's December 9, 2016 [open letter](#) to newly elected President Trump where we stated:

What is necessary, and we hope soon forthcoming, is a lawful Congressional enactment that establishes the lawful status and presence of those who were brought to this country unlawfully as children and have remained here as law-abiding members of our communities.

This is not just a matter of importance to DACA students. Repeatedly, our student body and their elected leaders, led by their own sense of justice, have appealed to this board on their behalf.

In addition to the interests of DACA students, the board's decision to allow the court to resolve this question is in the best interests of Arizona. I've already noted the importance of an educated workforce to Arizona's economic competitiveness. But other significant state interests are also implicated.

Contrary to popular perception, not all Dreamers are Mexican, but many are. Arizona has strived mightily to improve relations with Mexico. An abrupt termination of in-state tuition for some, but not all, of Arizona's DACA students can only impede those efforts. It will undoubtedly be seen by our Southern neighbors as unnecessarily cruel and illogical.

In closing, I have just a few comments regarding the statutes you cite at the end of your letter. As regards your suggestion that the board members "could face personal liability," I have every reason to believe that the board acted in good faith. Thus all board members are immune under the Arizona statute that applies specifically to actions of the board. See ARS § 15-1621(F). As noted above, tuition setting is within the scope of authority granted to the Regents. The board acted in accordance with its responsibilities and in good faith when it voted 7-1 to maintain in-state tuition for DACA students. The timeline I have provided speaks clearly to the board's measured and good intentions.

Beyond pointing out that the Regents have immunity when acting in good faith, I will say only that we do not believe the statutes you cite at the end of your letter are applicable to the facts and

circumstances present here. I do not think it appropriate to share our legal analysis in this letter as it will simply provide a roadmap to the private party you mention in your letter as intending to pursue such claims. I will add that Mr. Pearce himself is familiar with and has abided by the practice of waiting until the courts have resolved an uncertain legal question. If, however, your office decides to file suit against the board, I ask that you first meet with our outside legal counsel who can explain why that would not be appropriate.

I thank you for initiating this correspondence. I know that we share a mutual commitment to acting in the best interests of the state and of all of its citizens, as well the DACA students. I hope you will agree that those interests are best served by following your office's well considered policy of awaiting a final decision from the Arizona Supreme Court instead of initiating a new lawsuit. I assure you that should the court decide either to deny review or uphold the decision of the lower court on the merits, there will be no need for your office to consider further litigation.

Sincerely,



Eileen I. Klein
President

Appendix: Facts and timeline regarding board's actions

- The Arizona Board of Regents is not a party to the case before the court. The case is between MCCCDC and the State of Arizona.
- University tuition is set by the Arizona Board of Regents and is regulated in sections of the statute under review by the court. Consequently, the case is of significant interest to the Board and to students at Arizona's public universities.
- On May 4, 2015, the board approved ABOR Policy 4-202 "Non-resident Undergraduate Tuition Rate for Arizona High School Graduates," which allows eligible graduates of Arizona high schools who are not otherwise eligible for resident tuition status, to pay a nonresident undergraduate tuition rate of 150 percent of undergraduate resident tuition.
- On May 5, 2015, the Superior Court found in favor of MCCCDC's ability to charge in-state tuition to DACA students who are able to demonstrate in-state residency under the policies that apply to all students.
- Following its review of that decision, and prior to any formal decision by the AG to appeal the decision, on May 7, 2015, the Arizona Board of Regents interpreted its tuition policy to extend in-state tuition rates to Arizona students with DACA status.
- On July 1, 2015, the AG appealed the case to the Court of Appeals. No notice was given to ABOR of any concerns at that time.
- On June 20, 2017, the Court of Appeals reversed the decision.
- On June 27, 2017, the MCCCDC board voted to appeal by filing a Petition for Review with the Supreme Court.
- On June 29, 2017, ABOR held a public meeting. No tuition vote was taken by the board. The board voted on a statement that notified the public that the board would continue to allow eligible Arizona DACA students to pay in-state tuition until the appeals process was exhausted.
- At no time in the case history has an injunction been sought to prohibit MCCCDC or the Arizona Board of Regents from continuing its normal course of action of waiting for the Supreme Court to decide.
- MCCCDC has sought and received an extension of time to August 21, 2017 to file its Petition for Review by the Supreme Court.
- At no time has ABOR created a special tuition category for DACA students